

REMARKS

Objections to the Drawings

The drawings stand objected to under 37 CFR 1.83(a).

The Examiner notes:

“Therefore, the distal ends of the two shoulder support members connected to each other must be shown or the feature canceled from the claim. No new matter should be entered.”

Although it is unlikely that 37 CFR 1.83(a) requires depiction of such conventional features as “joining,” applicants nevertheless submit new Figures 3B and 3C that show the joining of two distal ends (300). Corresponding amendments to the specification are also included.

Withdrawal of the objection is requested.

Rejections under 35 USC § 112, second paragraph

Claims 1-26 stand rejected under 35 U.S.C. 112, second paragraph, as failing to set forth the subject matter which applicants regard as their invention. In support of the rejection the Examiner states:

“Evidence that claims 1, 8, and 15 fail to correspond in scope with that which applicants regard as the invention can be found in U.S. Patent No. 6,164,509 filed July 19, 1999. In that application, applicants have stated that *at least one side support member disposed adjacent one of the lateral sides and having a proximate end connected to the backpack body at a second juncture between the outer side and one of the lateral sides and a distal end connected to one of the shoulder support members*, which was a reason for allowance over the prior art. This statement indicates that the invention is different from what is defined in the claims because there is no support for the breadth of the claims as presented in the original application.

“Claims 25 and 26 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

“Claim 25 is rejected to under 35 U.S.C. 112, second paragraph, as being incomplete for omitting essential structural cooperative relationships of elements, such omission amounting to a gap between the necessary structural connections. See MPEP § 2172.01. The omitted structural cooperative relationships are: the distal ends of the two shoulder support members connected to each other.

“The dependent claims not specifically mentioned are rejected as being dependent upon a rejected base claim, since they inherently contain the same deficiencies therein.”

Applicants vigorously disagree.

This final Office Action merely repeats the erroneous conclusion recited in the corresponding rejection in the first Office Action. No additional factual basis has been specified or provided in support of the legal conclusion. The Office Action still not shown even one modest admission by the applicants or by their attorneys that suggests that the “invention” is somehow different than the material found in the claims. Applicants’ attorney continues to recognize and to agree that the italicized quote (from the Office Action) from the Examiner’s Amendment in the parent application accurately outlines one difference between the claims as allowed there and the cited references. However it is clear that in the type of rejection proposed here, a clear admission that the “claim is not my invention” is absolutely before it can be affirmed. In some instances, one or the other of the U.S. Court of Appeals for the Federal Circuit or its predecessor court (the Court of Custom and Patent Appeals) have found “admissions-equivalent” in circumstances where in the Examiner’s Statement of Reasons for Allowance have provided statements that, when going un rebutted by the applicant, have the same content as an admission. Central to those cases, though, appears to be the fact that they deal with situations, specifically, during later litigation, where no rebuttal to the PTO is possible. Here, first, there is no admission by the applicants or their attorneys; Second, the italicized quotation in context does not, in direct effect, admit that material properly described and enabled content outside the bounds of the allowed claims, is not the “invention” of the applicants; third, applicants are able here to rebut the erroneous inference proposed in the Office Action proposed in this application. As is the applicants’ right: any inference or suggestion or belief that the invention claimed here is not their invention is in error. If the Examiner wishes a new declaration for this application, she should first provide reason why it is necessary and then request such a new Declaration.

The MPEP (Sec. 2172) outlines the procedure to be followed in such rejections. Sec. 2172 even notes that a “shift in claims” is appropriate and allowed in situations such as here. Such a shift is not a limiting concession. A rejection under 35 U.S.C. 112, paragraph two, remains inappropriate.

Applicants’ attorney again requests some caselaw support for the rejection found in the Office Action.

For these reasons alone, the rejection must be withdrawn.

Claims 25 and 26

The claims 25 and 26 stand rejected as “indefinite” or “incomplete for omitting...relationships of elements...[specifically]...The distal ends of the two shoulder support members connected to each other.”

Applicants and their attorney do not understand this rejection. Claim 25 (prior to the extensive amendment herein) included the specific words “only two shoulder support members with the distal ends of the two shoulder support members connected to each other...”

It is clear that the omitted words or relationships complained of in the Office Action, are specifically included in claim 25.

Since the rejection of claim 25 (and claim 26) is insufficiently clear to provide a basis for reply, the rejection should be withdrawn.

Furthermore, MPEP 2172.01 indicates that a rejection for failing to “interrelate essential elements of the invention” under 35 USC 112, paragraph two, is only appropriate where the “essential elements” are defined by the applicants in the specification. The Examiner has provided only summary and conclusive comments relating to what is viewed as “essential” in the Office Action. The applicants have not categorized any limitation as “essential” either in the prosecution record or in the patent application itself.

Failure to follow the basics specified in the MPEP should at least result in a withdrawal of the finality of the rejection and a restatement of a proper and complete rejection. However, since the rejection is not based on a proper factual grounding, the rejection should be simply withdrawn.

Finally, the suggestion that depending claims are appropriately rejected under 35 U.S.C. 112, paragraph two, on the cited bases, i.e., "they wholly contain the same deficiencies therein," is very wrong, both in logic and in law.

It is the task of the PTO to recite specific and correct factual bases for the rejections noted. Such has not been done in this Office Action and it is an error that must be rectified if an appeal is taken.

As an instance of illogic of the Office Action - suppose, *arguedo*, an applicant stated that a device "would not work unless section A is connected with section B in such a way that section A is freely slidable with respect to Section B." and claims 1 and 2 recited:

1. A continuation device...wherein section A is connected to section B.
2. The device of claim 2 where section A is freely slidable with respect to Section B.

Assuming *arguedo* that an "essential element" rejection is appropriate under 35 U.S.C. 112, paragraph two, how is it that claim 2 "inherently includes the same deficiencies as claim 1".

Because the factual basis for the rejections of the depending claims has been erroneously omitted from the Office Action, one of the following is the proper cause: the finality of the rejection must be withdrawn, the basis for rejection specifically provided, or the rejection simply withdrawn as improper.

Withdrawal of the rejection is appropriate and is requested.

Rejections under 35 U.S.C. § 102 - Sizemore

Claims 1, 3, 4, 5, and 15 stand rejected under 35 U.S.C. 102(e) as anticipated by Sizemore (U.S. Patent No. 6,130,616). In support of the rejection the Examiner states:

Sizemore discloses an ergonomic backpack comprising:

- “A backpack body (1);
- “A plurality of shoulder support members (2), each having a proximal and connected to the body at first transition region (Figure 3);
- “The body comprises a single, seamless, continuous member to the degree applicant claims;
- “The backpack is comprised of nylon with a fineness between 500 denier and 1050 denier (Column 5, lines 27-28); and
- A plurality of straps (Figures 1-3).”

Applicants disagree.

First of all, claims 1 and 15 have been cancelled and consequently the rejection is moot as to those claims. Claims 3, 4, and 5 now depend from claim 21, a claim not rejected as anticipated by the Sizemore patent. Withdrawal of the rejection is appropriate on those grounds alone.

However, it is a requirement that a proper anticipating prior art reference show all of the limitations found in a claim under examination. The now-cancelled claim 1 required that each shoulder support member “proximal end” be connected to the backpack body at a “transition region” between a “top region” and an “outer region.”

There is no disclosure nor any suggestion in Sizemore to connect the shoulder support member to a transition region between the outer and top regions of the backpack shown there.

The Sizemore patent should not be applied to any claim in this application.

35 U.S.C. § 102 - Clements

Claims 1, 7-9, 11-13, 15, 16 and 21 stand rejected under 35 U.S.C. 102(e) as being anticipated by Clements (U.S. Pat. No. 6,024,265). In support of the rejection the Examiner states:

“Clements discloses an ergonomic backpack comprising:

- A backpack body (1);
- A plurality of shoulder support member (11), each having a proximal end connected to the body at first transition region (Figure 4);
- An adjustable hip belt (12) attached to the backpack body, wherein the hip belt is comprised of two pieces, each respectively attached to a lateral side (Figures 4 and 5);
- The body comprising a single , seamless, continuous member to the degree applicant claims;
- The backpack is comprised of nylon;

- A plurality of straps (Figure 1);
- The hip belt is attached to the backpack body at one or more of the straps (Figure 1); and
- The distal end of each shoulder support member is connected to the backpack body at a second transition region between the outer region of the backpack and a lateral side region of the backpack (Figure 6), to the same degree applicant claims.”

Applicant disagree. First of all, claims 1, 8, 9, 11-13, 15, 16 have been cancelled thereby technically mooted the rejection of those claims. Claim 21 has been amended and is now an independent claim containing the limitations of claim 1. Claim 9 is the single remaining numbered claim cited in the Office Action said to be anticipated by Clements.

Each of unamended claims 1, 8, and 15 required, prior to their cancellation, that the various “shoulder support members” have “proximal ends” that are connected to the backpack body at “first transition region” situated between “a top region of the backpack body and an outer region of the backpack body”. The Office Action specified that, in Figure 4, that a “carrying harness 11”--see column 3, line 37, somehow has a proximal end connected to the body at a first transition region. Figure 4 shows no such number 11, although Figures 1, 2, 5, 6, and 7 each show such a shoulder strap. However, none of the shoulder straps shown in the Clements reference has a strap proximal end connected to the backpack body at transition region between a top region of the backpack body and an outer region of the backpack body. It is clear from the specification what is meant by those terms and despite the summary commentary in the rejection, that connection is not shown. Consequently, the prior art anticipation rejection of the independent claims formerly in the application was incorrect even then.

Claims 21 and 9 would presumably be subject to a rejection over Clements. However, reviewing the disclosure of Clements, the shoulder harnesses are not attached to the transition between the outer and upper regions of the backpack. If it is the intent in the Office Action to redefine the clearly stated “region” limitations without so informing the applicants, the courtesy of such redefinition would be appreciated so that the error of the final rejection may be better

explained upon appeal. Since claim 9 depends now from claim 21, the Clements reference is less applicable.

Finally, it is noted that the Office Action suggests that "the distal end of each shoulder support member is connected to the backpack body at a second transition region between the outer region and a lateral region of the backpack (Figure 6), to the same degree applicant claims." It would be vastly clarifying to the Office Action, if the Examiner would specify where in the drawing designated as Figure 6 in the Clements patent may be found what is considered "the outer region" and a "lateral side region". There seems to be no correspondence between the words found in the claims and the summary rejection found in the Office Action.

Withdrawal of this rejection is requested.

35 USC § 103 - Clements v. Lemire et al.

Claims 6, 14, and 17 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Clements in view of Lemire et al. In support of the rejection the Examiner states:

"Clements discloses all of the limitations of claims 6, 14, and 17 except the backpack body comprising a yoke disposed along the top region and connected to each shoulder support member. However, Lemire teaches a backpack having a yoke (9) disposed along the top region and connected to each shoulder support member. It would have been obvious to attach the yoke of Lemire to the backpack of Clements. Doing so would provide an alternate means of attaching the shoulder support members to the backpack and allow more comfort to the wearer."

Applicant disagree.

Again, the claims under rejection here, claims 14 and 17, have been cancelled rendering the rejection moot. Claim 6 now depends from claim 21.

Claim 6 would seem to be the remaining claim of question under this rejection. Neither Clements nor Lemire et al. show the structure in which a shoulder support member has a proximal end connected to the backpack body at a first transition region between the top region of the

backpack body and an outer region of the backpack body. So far as it is understood from the two patents cited, the proximal ends of the straps are attached to what, by convention, would be the body side or body region of the backpacks shown there. In the absence of any teaching relating to the attachment of the shoulder support members to the backpack body, and the failure of the Office Action to deal with this limitation, the rejection must clearly be seen as error and be withdrawn.

Furthermore, Lemire et al., while showing a yoke, does not show the positioning of that yoke as “disposed along the top region”.

The rejection should be withdrawn.

Double Patenting Rejection

Claims 2, 10, and 18-26 stand rejected under the judicially created doctrine of obviousness-type double patenting as unpatentable over claims 1, 16 and 19 of U.S. Patent No. 6,164,509. In support of the rejection, the Examiner notes:

“Although the conflicting claims are not identical, they are not patentably distinct from each other because they claim the same subject matter that made the claims allowable over the prior art.”

Applicants disagree with this rejection on several levels. First of all, the test mentioned in the rejection is simply erroneous. The test, in its most basic form is this: Are the claims in issue in the application obvious in some clearly recitable fashion over the claims in an issued patent? The MPEP (in Section 804, B. Nonstatutory Double Patenting, 1. Obviousness-Type) suggests or mandates the use of the *Graham vs. John Deere* analysis in making an obviousness-type double patenting analysis. It is clear that no such analysis is present to allow the applicants a reasonable chance of replying in a meaningful way.

The only “analysis” provided in the Office Action is that the claims in the parent patent and claims 2, 10, and 18-26 in this application recite “the same subject matter that made the (patent) claims allowable over the prior art.” Assuming this to be true, it is irrelevant to the required

comparison between the claims. Just because a truck and a Corvette share a similar color and type of paint, Corvettes are not (without more, much more) obvious from trucks.

Secondly, as best as can be understood from the statement of the double-patenting rejection, the Examiner's position is that claims 2, 10, and 18-26 recite the "subject matter that made the (patent) claims allowable over the prior art..." and yet the Examiner continues with at least one logically inconsistent rejection. At least one such rejection is the apparently unique rejection under 35 USC 112, paragraph two, under which all of the claims are said not to "set forth the subject matter which applicant(s) regard as their invention." The fault with these claims, i.e., all of the claims, is said to be their failure to include a specific limitation found in a claim in the parent patent.

Applicants' attorney agrees that the specific words said by the Examiner not to be present: "*at least one side member disposed and connected to one of the shoulder support members*" are, in fact, not present in the claims in this application. But understand what this means: the Examiner considers the concept found in those italicized words from the parent case to be the same as the recited (and complained of) common "subject matter" in the parent claims and claims 2, 10, and 18-26. Under this illogical stance: claims 2, 10, and 18-26 contain the "subject matter" under the double patenting rejection and yet don't contain that same subject matter under the 35 U.S.C. 112, paragraph two rejection. Both rejections' lack of clarity must be rectified before either can be adequately answered or explained to the Board of Appeals and Interferences.

CONCLUSION

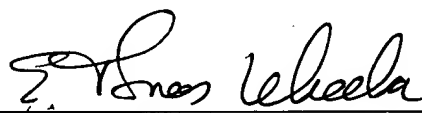
Applicants have replied to each matter of substance in the Office Action. Allowance of the application is requested.

In the unlikely event that the transmittal letter is separated from this document and the Patent Office determines that an extension and/or other relief is required, Applicant petitions for any required relief including extensions of time and authorizes the Assistant Commissioner to charge the cost of such petitions and/or other fees due in connection with the filing of this document to Deposit Account No. 03-1952 referencing docket no. 430672000101.

Respectfully submitted,

Dated: December 10, 2002

By: _____



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VERSION WITH MARKINGS TO SHOW CHANGES MADE

In the Drawings

Please add Figures 3B and 3C as shown in the attachment.

In the Specification

Please add the following paragraph to the specification at page 2, line 19 as follows:

Figures 3B and 3C shows the connection of two straps.

Please add the following paragraph at page 11, line 6 as follows:

Figures 3B and 3C show respectively, the connection of the distal ends of two shoulder straps (300) and the connection of the distal ends of two side straps (400) with a connection of the type described just above.

Claims 1 and 8-20 have been cancelled.

Claims 2-7, 21, 24, and 25 have been amended as follows:

2. (Amended) The backpack of claim [1] 21 additionally comprising at least one side support member disposed adjacent a lateral side region of the backpack body and having a proximal end connected to the backpack body at a second transition region between the outer region and the lateral side region and a distal end connected to one of the shoulder support members.

3. (Amended) The backpack of claim [1] 21 wherein the backpack body comprises a single, seamless, continuous member.

4. (Amended) The backpack of claim [1] 21 wherein the backpack body comprises
Nylon.

5. (Amended) The backpack of claim [1] 21 wherein the backpack body comprises a fineness of between about 500 denier and about 1050 denier.

6. (Amended) The backpack of claim [1] 21 additionally comprising a yoke disposed along the backpack body top region and connected to each shoulder support member.

7. (Amended) The backpack of claim [1] 21 wherein a bottom region of the backpack body has a stiffness higher than a stiffness of the rest of the backpack body.

21. (Amended) An ergonomic backpack comprising: [The backpack of claim 1]
a backpack body having a top region, an outer region, lateral regions, and
a plurality of shoulder support members, each shoulder support member having a distal end
and a proximal end, each shoulder support member proximal end connected to the backpack body at
a first transition region between a top region of the backpack body and an outer region of the
backpack body and wherein the distal end of each shoulder support member is connected to the backpack body at a second transition region between the outer region of the backpack and a lateral side region of the backpack body.

24. (Amended) An ergonomic backpack comprising: [The backpack in claim 1]
a backpack body having a top region, an outer region, a bottom region, lateral regions, and
a plurality of shoulder support members, each shoulder support member having a distal end
and a proximal end, each shoulder support member proximal end connected to the backpack body at

a first transition region between a top region of the backpack body and an outer region of the backpack body and wherein the distal end of each shoulder support member is connected to the backpack body at a third transition region between the outer region of the backpack body and the bottom region of the backpack body.

25. (Amended) An ergonomic backpack comprising: [The backpack in claim 1 having]
a backpack body and

only two shoulder support members, each shoulder support member having a distal end and a proximal end, each shoulder support member proximal end connected to the backpack body at a first transition region between a top region of the backpack body and an outer region of the backpack body and, with the distal ends of the two shoulder support members connected to each other and [provides] providing support to [the] a lower outer region of the backpack body.